

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**FIRST APPEAL NO. 2126 OF 2000****For Approval and Signature:****HONOURABLE MR.JUSTICE R.S.GARG****HONOURABLE MR.JUSTICE K.M.MEHTA**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge?
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AHMEDABAD MUNICIPAL CORPORATION - Appellant(s)**Versus****NITA INTERNATIONAL - Respondent(s)****Appearance :**

MR. PRASHANT G. DESAI for Appellant.

M/S. VYAS ASSOCIATES for Respondent.

CORAM : HONOURABLE MR.JUSTICE R.S.GARG**and****HONOURABLE MR.JUSTICE K.M.MEHTA****Date : 31/08/2005****ORAL JUDGMENT****(Per : HONOURABLE MR.JUSTICE R.S.GARG)**

1. At the very outset, Mr.Dhaval Vyas, learned Counsel, informed the Court that long back, they had informed the respondent-M/s.Nita International that they would not be

appearing in their case. Despite service of their registered letter upon them and the respondent having withdrawn the papers/brief from their Office, the respondent has not made any alternative arrangement, therefore, the Court may proceed with the matter, but, however, should allow the Counsel to withdraw from the matter.

2. As the respondent was already informed by its Counsel that the Counsel shall not be representing it and despite that information and service of the same upon the respondent, and the respondent having withdrawn the papers/brief from the Counsel's Office, it has not taken care to make any alternative arrangement, we proceed with the matter. We allow Mr.Dhaval Vyas, learned Counsel, to withdraw from the case and proceed *ex parte* against the respondent.

3. The appellant-Ahmedabad Municipal Corporation has filed this appeal against Judgement and Decree dated 5th July, 2000 passed by the learned Judge, Court No.17, City Civil Court, Ahmedabad, in Regular Civil Suit No.1623 of 1997, decreeing the suit filed by the respondent, restraining the present appellant permanently from implementing and/or enforcing the notice, issued to the plaintiff under Section-260(2) of The Bombay Provincial Municipal Corporations Act, 1949 (hereinafter referred to as 'the Act' for short) *vide* reference No.C/Shed/WZ/23/5 dated 10th February, 1997.

4. The facts summary is that M/s.Nita International had purchased certain constructed part of a building and the terrace rights from the erstwhile owner; after some time, they made certain constructions inside the constructed area by raising a mezzanine floor and also started using the terrace as a restaurant; the appellant issued notices to M/s.Nita International, original plaintiff, that the construction made by M/s.Nita International was contrary to the provisions of the Act and the Regulations/By-laws governing the construction and as the construction was permanent in nature, the same was liable to be demolished. The first notice was issued on 24th November, 1997 under Section-260(1) of the Act. After receiving the reply from the plaintiff and after recording a finding that the construction was in violation of Section 253/254 of the Act, the appellant-Corporation issued a final notice under Section-260(2) of the Act on 21st December, 1997 and required the original plaintiff to remove the construction and the mezzanine floor and other constructions and also required the plaintiff to demolish the constructions raised on the terrace. Being aggrieved by the second notice, requiring the plaintiff to demolish the construction, the plaintiff, accordingly, filed the above referred suit.

4.1 It was submitted in the suit that the suit notice was issued by the Corporation at the behest of the other occupants of the building because the plaintiff was having some

dispute with the other occupants of the building and such other occupants could persuade the Municipal Corporation to issue the impugned notice; that no illegal construction was made by the plaintiff, mezzanine floor was made of wood and the terrace was simply used as a restaurant by putting certain plastic sheets as roof and by raising a small construction for the purpose of kitchen. It was also pleaded that the Estate Officer, who had issued the Notice, had no powers under the provisions of law to issue such a Notice asking for demolition.

4.2 The defendant/appellant submitted to the Court that the Notice was not issued at the behest of the other occupants, but, was based on basic foundation; the constructions made by the plaintiff were permanent in nature and permission for raising such constructions was needed under Section-254 of the Act and in absence of such permission, the construction was liable to be demolished and that under Section-69 of the Act, power was validly delegated in favour of the Estate Officer and the Estate Officer was competent and authorised to issue the Notice for demolition.

4.3 The learned trial Court allowed the parties to lead evidence in support of their respective contentions and pleadings. The plaintiff had examined its Manager in support of its case, while the defendant examined their Officers in support of their submission that the construction was illegal and contrary to the building permission/regulation.

Some panchnamas were also filed before the Court to prove that the construction was illegal. After hearing the parties, the learned trial Court observed that the Notice was not issued at the behest of the others and issuance of the Notice by the Estate Officer was not to cut any ice in favour of the plaintiff because the Notice was validly issued. However, on the basic dispute that the construction was valid and temporary in nature or was illegal or permanent in nature, the Court observed that some of the constructions were made before the plaintiff had purchased the property and secondly, that the construction was temporary in nature, therefore, the permission was not needed.

4.4 The trial Court, in view of the finding recorded by it, restrained the defendant-appellant, permanently from implementing/enforcing the suit notice issued on 4th December, 1997.

4.5 Being aggrieved by the said judgement and decree, the appellant is before this Court.

5. Mr.Prashant G.Desai, learned Counsel for the appellant, submitted that a fair perusal and understanding of Section-254, read with Section-260, would make it clear that the burden of proof that the construction was temporary in nature and was not violating any by-law or building permission/regulation or the provisions of law, was upon the plaintiff. His submission

is that while the Court appreciated that certain wooden structures have been raised and the kitchen has already been constructed on the terrace, the burden could not be cast upon the defendant to show that these were permanent in nature. His submission, in fact, is that once the Corporation comes out with a case that a particular occupant/owner of the building had made certain constructions and the constructions are contrary to law, then, the burden would be upon such occupant/owner to prove to the satisfaction of the Court that the constructions are not illegal or have been raised with the permission of the Corporation and/or are temporary in nature or are not permanent in nature. He submits that the learned Court below, while observing that the fact of raising construction was proved, erred in holding that the defendant failed to prove that it was permanent in nature. His submission is that it was for the plaintiff to prove that the constructions were not permanent in nature.

6. Mr.Desai has taken us through the part of the judgement wherein the contentions raised have been discussed by the Court. We find from the judgement that the learned Court below, in relation to the mezzanine floor, did observe that certain constructions have been made, but, it simply observed that it is not permanent in nature. The trial Court has also observed that in the open area, toilet has been constructed while the toilet was to be constructed in the cellar/basement and at the same time, the learned trial Court has observed that the cellar

was made for parking. It also appears from the findings recorded by the trial Court that a kitchen has been constructed on the terrace, but, the trial Court observed that the defendant failed to prove that of what material, the roof was made.

7. In our considered opinion, all these things were to be proved by the plaintiff. The defendant was required only to prove to the satisfaction of the Court that certain constructions have been raised without obtaining any permission under Section-254 of the Act and after giving an opportunity of hearing, an order under Section-260 of the Act has been passed. Any person, who challenges the proceedings drawn by and the final order passed by the Corporation, if comes to the Civil Court, then, he will have to satisfy the judicial conscience of the Court that the construction made by him was not permanent in nature or no permission for making such additions, alterations/constructions were required. The Court below, in our considered opinion, went astray in making such observations and also fell in error in holding that the defendant failed to prove that the construction was permanent in nature.

8. Taking into consideration the totality of the circumstances and the illegal approach adopted by the learned trial Court, we set aside the Judgement and Decree passed by the learned trial Court and remit the matter back to the

learned trial Court with a direction to rehear the parties and decide the matter in accordance with law and the observations made aforesaid.

9. The appellant, who is present in this Court, shall appear before the trial Court on 19th September, 2005. As the respondent is not represented before us, the trial Court shall issue a Notice to the original plaintiff and after securing its attendance, shall give due opportunity of hearing to the parties and dispose of the matter afresh within a period of three months from the date of attendance of the plaintiff. Accordingly, the appeal stands allowed. No costs.

[R.S.Garg, J.]

[K.M. Mehta, J.]

*kamlesh**